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Supreme Court of the United States

OCTOBER TERM, 1940

No. 312

**HARRY R. SWANSON, AS SECRETARY OF STATE OF
NEBRASKA, ET AL.,**

vs.

**GENE BUCK, INDIVIDUALLY AND AS PRESIDENT OF THE
AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUB-
LISHERS, ET AL.**

**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF NEBRASKA**

**REPLY BRIEF OF APPELLANTS
AND APPENDIX**

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Office - Supreme Court, U. S.

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APPELLANTS BELIEVE A REPLY BRIEF NECESSARY AND ACCORDINGLY SUBMIT THE FOLLOWING:

Appellees on pages 3 to 33 of their brief set forth under headings II to IX, inclusive, statements in the nature of "Confession and Avoidance." Each of these eight statements seeks to justify ASCAP based upon convenience and necessity.

The general effect of the appellees' brief is: That the income to be derived for the "public performance rights" granted by the National Copyright Law, as interpreted by ASCAP in their brief, cannot be collected except by operating a price-fixing monopolistic combination.

It requests this High Court to permit ASCAP, by judicial decree, to carry on its practices, which are in violation of the anti-monopoly laws, because it must do so in order to give effect to a "right" given to an individual, with the power of assignment, under the National Copyright Law.

The appellees in their brief generally, have failed to properly answer the "Points Relied Upon for Reversal," set forth in appellants' brief, pages 68-74. For example, they have failed to answer appellants' Law Point Number I, which cites established law that the individual monopolies granted the copyright owner "*cannot be unitedly exercised to restrain competition and fix prices*"; they have failed to answer Law Point Number II, "*as to when and how the police power of the State shall be exercised*"; they have overlooked the Tenth Amendment to the Constitution of the United States in their excuses and explanations for their existence; they have failed to admit the established law that a state has the right to pass reasonable regulations in reference to the use that may be made of copyrights within the state; they have failed to recognize the rule that Congress under the National Copyright Law has limited itself to defining what *may be copyrighted* and the *exclusive monopoly* therein given to the individual and the *length of time* that exclusive right may be exercised; they have confused those National rights with the State's right to correct abuses in the unlawful uses that have been made of them within the State; they have failed to answer Law Point No. IV and the arguments in reference thereto, wherein the appellants have challenged them to answer that the playing and singing of music by musicians within the State is

a performance or use that is *intrastate* by its very nature; that ASCAP has been carrying on an *intrastate business* by levying its licenses—not against musicians, nor instruments, nor individuals, but against the *establishment within the State* where its music is *performed*—not bought or sold.

These problems they have failed to answer, but conclude that their business is *now interstate* and affects *interstate commerce* and they should therefore be exempted from the Nebraska law.

They have failed to answer Law Point V, that the penalties of from \$1.00 to \$5,000.00, with violations deemed misdemeanors only, have been construed as *proper penalties*, and they have further failed to answer the fact that the limitations of the Eighth Amendment is a limitation upon the Federal Government, *not upon the states*; they have failed to answer Law Points VI, VII, VIII and IX, which deal with the "inseparability" and the "inducing cause" features, by failing to answer the effect of the motion for a new trial in the court below and the abandonment by the lower court of those features, when it adopted its findings of fact and conclusions of law (drawn under the order of the court by the appellees themselves) which became the court's final papers; they have avoided answering the point that the findings of fact and the conclusions of law fail to support the permanent injunctive decree thereby establishing reversible error; and they seek to confuse the point that the appellants are the State of Nebraska and not personal users quarreling over prices with ASCAP.

In balancing the equities these appellant State officials are entitled to have the state court of Nebraska pass upon the "inseparable" and "inducing cause" features should this High Court consider them still an issue on appeal.

The first 33 pages of the appellees' brief, appellants contend, contain no justification for the existence of ASCAP.

Nor have appellees answered the fact that the individual appellees are a part of the unlawful organization and have no standing in court to urge their individual problems, as long as they elect to remain a part of that organization.

The statement of appellees' position, presents social problems and emphasizes its members' *plight* in connection with public performance right if the unlawful monopoly is dissolved.

They have failed to cite legal authority, *except consent decrees*, legally permitting ASCAP to collect for public performance rights in a manner which the appellees admit are impossible of attainment except by a combination found to be monopolistic.

They have failed to show that the statement of law announced by the Supreme Court of the United States, 243 U. S. 490, set forth on page 81 of appellants' brief, is not applicable to the facts in the case at bar:

"* * * the scheme was regarded by the plaintiff itself and by its agents simply as one for maintaining prices by holding a patent infringement in terrorem over the ignorant and the timid."

Appellees have failed to answer the proposition that, of all monopolies that should be prohibited, is a combination of individuals who have been granted personal copyrights, which if violated gives them further rights granted by their Government, to compel either non-use or the exaction of pay in such amount as such individuals might wish. The assignment to the combination by such individuals carries with it the *compulsory features* of enforcement by infringement, in addition to the exclusive right of use. While appellees have not answered this last mentioned general proposition, the appellants claim that Justice Brandeis did so, when he announced the decision of this Court by stating (283 U. S. 163):

“If combining patent owners effectively dominate industry, power to fix royalties for licenses is tantamount to power to fix prices” (Appellants’ Brief, p. 70).

In this regard, there is no distinction between patent rights and copyrights.

Furthermore, appellees have failed to meet the issue that the Nebraska statute does permit the functioning of its organization within the State of Nebraska, for the purpose of collective action to protect its members against infringement; to gather facts for its members upon which to base their public performance licenses; to encourage the use of music and more music; to develop the creative art of musical composition; to protect its members from unwise and unwarranted interference with their legitimate rights under the National Copyright Law; to bargain for its members with music users; to carry on its social problems; and to provide funds for

their unfortunate members. But the Nebraska statute *does* rightfully *prohibit the unlawful practices of combinations of substantial numbers* of the holders of public performance rights of copyrighted vocal and instrumental musical compositions, who thus combine for the purpose of fixing fees and forcing the users to deal in restraint of trade, upon its terms—or be sued under another assigned right (infringement) really for not doing so.

When a combination has been proven in a proper case to be so constituted and endowed, the Court should “do its duty” and dissolve a permanent injunction under which judicial sanction alone the trust lives and thrives.

On pages 19 and 20 of appellees’ brief they claim there has been “an organized effort to destroy the appellee Society,” and they cite a long list of bills introduced in Congress to amend the National Copyright Law, as proof thereof.

The appellees introduced an exhibit (R. Vol. II, p. 791, Ex. 31), *showing not only Congressional bills but state laws*. Furthermore, in this action they filed an “Appendix to Appellees’ Brief,” setting forth numerous state statutes that have been passed. It therefore seems there is and has been a popular demand to curb the activities of associations that deal in public performing rights of music.

The Chairman of the United States Senate’s “Committee on Patents and Copyrights,” so thinks. On May 5, 1937, when United States Senator Duffy, who then held that position, made an address on the subject of ASCAP before the section of “International and Com-

parative Law" of the American Bar Association in session in Washington, D. C., he stated as follows:

"There is no limit to the amount they will charge. 'All the traffic will bear' is the only limitation. I have a letter which the American Society of Composers, Authors and Publishers wrote to Mr. Alex N. Schmalz, Route No. 1, Nemaha, Wisconsin, under date of March 13, 1934. Among other things, the letter said, 'This isn't a matter of what you feel like paying. You fill out the application and send it to us and we will tell you what you should pay.'

"They can actually determine whether a small dance hall can run. I have in mind the instance of a summer resort hotel in northern Wisconsin called the Alpine Resort at Egg Harbor; Mr. Paul Bertschinger is the manager. They do have an orchestra which plays for the guests, but no extra charge is made if they care to dance. ASCAP started them off with a \$25 license fee; then a year or two ago they raised this fee arbitrarily to \$150. When Mr. Bertschinger sent in \$36, it was scornfully returned, and he was sued in the Federal Court for the Eastern District of Wisconsin.

"That an organization which gives a dance may be of a non-profit nature does not make any difference. I have a letter from the American Society of Composers, Authors and Publishers dated December 10, 1934, addressed to the Bowler Fire Department. Bowler is a small town in Wisconsin. The Society says in their letter, 'The fact that the dance and entertainment is for local benefit, and that yours is a non-profit organization, of course, does not exempt you from the necessity of obtaining a license from this society. * * * Under all the circumstances the license will be \$60.'

"I have a letter from the Waupaca War Memorial Armory, at Waupaca, Wisconsin. This armory operates a National Guard Armory to defray operating expenses and to establish a mess fund for the

enlisted men of the Howitzer Company, 127th Infantry. They hold a few dances each year, barely realizing enough to make a little profit. This Society claimed they owed them \$75, saying that they owed it for the three years, 1933, 1934, and 1935. There was no money in the treasury, so the soldier boys had to 'dig down.'

"This monopoly represented by ASCAP feels that the consuming public has no rights which should be considered. I have here a letter on the stationery of the American Society of Composers, Authors and Publishers dated July 1935. It is addressed to Mr. J. Dodmead of Osseo, Wisconsin. I quote parts of the letter:

"I have your letter from which I note you only run old time dances. In response, let me say that the copyright on a sheet of music runs for 28 years. It is hardly likely that your musicians would play music older than that, even if they did know how to play it. I am sure that people want to hear music which is popular, music which is heard over the radio, and certainly not the schottisches and square dances of their grandmother's youth.' Then he ends up the letter by adding, 'It will be far cheaper for you to obtain a license than to take a chance of infringing, since the law provides for damages ranging from \$250 up to \$5,000 for each violation.' And the word 'each' is underlined in blood-like red—I suppose to intimidate and frighten this good citizen of my State.

"I have again introduced a bill in this Session of Congress, known as S. 7. It contains almost the same provisions as S. 3047, which passed the Senate. That bill seeks to eliminate the liability of the receiving set owner, unless the broadcast received constitutes the whole or a portion of that for which the customers directly pay. The dance hall would continue to be liable, for music is of the essence of the services for which its charges are made; but the barber shop, the boarding house, the taxi cab driver,

and others using it in a merely incidental way would no longer be deemed to be engaged in a public performance for profit."

Senator Duffy stated ASCAP's opposition to any amendment of the National Copyright Act, in the following language:

"But the big opposition came from ASCAP and its very efficient lobby * * * the very best in Washington."

The foregoing statement is cited by appellants because appellees have cited in their brief references to articles and pamphlets favoring ASCAP.

In the lower court, in opposition to the application for a temporary injunction, and in support of their motion to dismiss, the appellants filed a printed "Counter-Showing," made up of many affidavits signed by numerous small, as well as the large, users of music within the State of Nebraska similar to Senator Duffy's statement. That printed "Counter-Showing" of 164 pages consisting of affidavits and letters shows the methods used by ASCAP in enforcing its alleged rights against the dozens of small users of music in Nebraska that are dependent upon "public performance" for their own profits after they have bought and paid for the music, ostensibly, and by the very makeup and composition of the music, to be used for public performance for profit. A printed copy of that "Counter-Showing" will be left with the Clerk of this Court.

In the trial of the case on the merits, the respective counter-showings in support of the application for the temporary injunction, and in resistance thereto, were offered, but not received, in evidence. No error is predi-

cated on that score. But, in view of the fact that the appellees have disregarded the ruling and have inserted the affidavit of Anna Paul Nevin, in R. Vol. II, at page 1047, which affidavit was not placed in the record at the hearing on the merits, nor in any "designation" of the record, appellants feel justified in tendering likewise their counter-showing. It need not be referred to by the court.

On page 24 of appellees' brief, they assert that the Society controls only a "small part" of the available music. In reply to this assertion appellants state that if such fact is proven in any action brought under Section 1 of the Nebraska Statute, then ASCAP at such time may prove it is not a combination composed of substantial numbers of the owners of copyrighted vocal and instrumental musical compositions who are strong enough to fix prices, defy competition and restrain trade in licenses for public performance rights, within the State of Nebraska. However, the record on that point in the case at bar, is (R. Vol. I, p. 127; 136, par. 11):

"The Society has control of from 85 to 90% of the popular music necessary for the successful operation of radio stations, dance halls, hotels and theaters, and has control of from 50 to 75% of the standard or older music that is played occasionally at such places."

There is no cross-appeal from that finding, and there is no error prosecuted on the rejection or admission of any evidence or exhibits in the case.

Furthermore, there appears no evidence in the record to refute these findings of the court.

On pages 25 to 33 of appellees' brief, they recite their own false interpretation of the Nebraska statute. The appellants believe that throughout the "Brief of Appellants," filed herein, proper explanations of the various terms of the statute in question have been made and therefore no detailed reply to the appellees' analysis is necessary. As it will be necessary for the Court to carefully read each provision of the Act, and especially after reviewing the authorities cited by both parties in their respective briefs, appellants respectfully refer the Court to the Act in question set forth in full in the Appendix to the "Brief of Appellants," pages 135-150.

However, *again* we direct attention to the obvious fact that the Act has two independent parts. Sections 2 (A), 2 (B) and 2 (D) are the parts that relate to the *individual*, while the balance of the Act relates to the *unlawful combination*. There are no penalties attached for violations of Section 2 (A), excepting the same penalty that is provided by the National Copyright Act, and that is, that if an author or a composer fails to mark upon his copyright material the reservations which he wishes to make in reference to its use, fully and completely or collect for it when sold, then he loses the rights (Sec. 2 B) which he might otherwise have obtained by compliance with the Act.

The Appellants' Criticism of the Appellees' Six Points Set Forth Under the Heading of "Argument" on Pages 33 to 76 of the Appellees' Brief.

Under the first topic, pages 33 to 53, the appellees assert that the State Statute violates the copyright clause of the Federal Constitution; that Congress has fully covered the field; that the State Statute confiscates appel-

lees' rights of public performance for profit; that it discriminates against owners of copyrighted works by failing to include common law copyrights; that the penalties for violation are more severe than those imposed under Nebraska Laws against other combinations monopolizing or restraining trade; that the State Statute discriminates against the copyright owners by denying them the right to show the reasonableness of their Association, and the further fact is claimed by appellees that they do not actually monopolize or restrain trade.

The appellees call the Court's attention to the cases of *Herbert vs. Shanley*, 242 U. S. 591, and *Buck vs. Jewell-La Salle Realty Co.*, 283 U. S. 191, as justification for their above enumerated positions in connection with public performance rights for profit and as authority for their right to collect each and every time the music, that has been sold and paid for, and obviously for public performance for the user's profit, is used.

In reply, the appellants deny that the *Shanley* case is authority for any such claimed right, for Justice Holmes confined his opinion to the one point, that admission need not be charged at the door of an establishment in order to constitute the playing of music therein a public performance for profit, under the circumstances in that case.

From a careful reading of the case, originally in the District Court, 222 *Fed.* 344, it will be seen that the then District Judge Learned Hand, held in reference to parting with music meant for public performance, as follows:

"This result no doubt involves the abandonment of some rights, secured by the dramatico-musical

copyright, but that is because the plaintiffs wished a double protection. There can be no justice in preserving their dramatic rights at the expense of the public's rights arising from taking out a musical copyright. Had they wished to retain a complete dramatic monopoly, they had it in their power to do so. As it is, that monopoly remains to their complete protection, except so far as its limitation is necessary to give full scope to the musical copyright. For instance, if the performance here had been anything beyond the least essentials to a musical reproduction of the copyrighted song, it would be protected; but it was not. The plaintiffs are really trying to eat their cake and have it; they would get the full benefit of a musical copyright, while they prevent the public from enjoying the corresponding rights."

On appeal this holding was not reviewed nor commented upon by the Supreme Court.

In the case of *Buck vs. Jewell-La Salle Realty Co.*, the only question decided was that a radio entertainment for the guests of a hotel received through their own radio was a public performance. Justice Brandeis in that case refused to hold that it was a public performance *for profit*. The case is not authority for the proposition urged by ASCAP, that it has the right to collect public performance rights each and every time a copyrighted musical composition is played or sung in public for profit by that purchaser, *unless* there is a special reservation of that right. Appellants do not contend that the purchaser of any music may copy, publish, or vend the same without permission, but do contend he may *use* it for the purpose purchased with implied or express knowledge of that purpose. Appellees in their brief cite no authority for their assumed right to collect from the purchaser of

musical compositions each and every time played, unless specifically restricted.

Appellants believe this proposition is closely related to the provisions of Section 2 (A) of the Nebraska Statute (Appellants' Brief, 138-139).

It has been considered in all of the testimony in the case and by all of the witnesses for the appellees, and with no evidence to the contrary, that ASCAP, as well as the individual appellees in this case, *are not concerned with the sale of sheet music* wherein a royalty of three cents a copy is collected at the time it is sold, by arrangement between the composer and the publisher; nor is it any concern of appellees about the *dramatico-musical composition* or the *grand rights*; nor is it any concern of the manufacturer of phonograph records, because the recording rights are definitely covered by the copyright statute, which requires the manufacturer to pay and the copyright owner to accept *two cents per musical composition* when and as the disc or record is manufactured for sale to the public.

If the appellees' claim is correct that it is a public performance for profit entitling it to collect further when that record so paid for is played in public in any hotel or other public place similar to Shanley's restaurant, then the copyright owner or his assignee should mark upon the disc his restrictions and prices for that purpose as provided by the Nebraska Act and collect for it when the record is sold, just as the recording rights are paid when the disc is manufactured.

In the case of *R. C. A. Mfg. Co. vs. Whiteman, et al*, 114 Fed. (2) 86 (certiorari denied 61 Sup. Ct. 393), the

court dealt directly with the problem of a restriction of the common law right upon a phonograph record, and held that when the record was sold for public performance rights, in spite of the restriction, the purchaser had the right to complete use and repeated use as often as desired for public performance rights for profit.

The decision was based upon a well recognized legal principle that:

"restrictions upon the uses of chattels once absolutely sold are at least prima facie invalid; they must be justified for some exceptional reason, normally they 'are repugnant' to the transfer of title."

However, in *Waring vs. WDAS*, 194 At. 631, the Pennsylvania State Court sustained the restriction upon the phonograph record.

Therefore, appellants' reply to these questions raised by the appellees, that Section 2 (A) of the Nebraska Law, if tested in actual operation, would be welcomed by the many composers not here represented by ASCAP who might wish to adopt its terms. The method provided [Sec. 2 (A) (B)] for collecting their public performance rights by an additional charge, which they themselves determine by arrangement with their publishers, and collected when the music was sold for such purpose by the music stores throughout the land, or from the catalog of the publishers (exactly by the same procedure as the sheet music royalties are now collected for composers and publishers) should not be denied them in a case where ASCAP and the other appellees interested therein, are *obviously* prejudiced because such plan required by the Nebraska Act would eliminate the necessity of

a price-fixing, unlawful combination of owners, such as ASCAP.

On page 36 of appellee's brief, they cite *Napier vs. Atlantic Coast Line R. Co.*, 272 U. S. 605, as authority for the *preemption theory*. That case merely holds because the Interstate Commerce Commission has been clothed by Congress with the power to adopt rules and regulations that have the effect of law, in reference to safety devices for locomotives engaged in interstate commerce, it was not within the purview of the state legislature to pass an act in reference to safety devices on locomotives used in interstate commerce. That case is not in point any more than *Jennings vs. U. S. F. & G.*, 294 U. S. 216, is in point, to sustain the appellees' *preemption theory* in the case at bar. The *Jennings* case is really in favor of the appellants because it holds that the Indiana Bank Collection Code is *applicable to national banks*, so far as consistent with the express or implied policy or provisions of the National Banking Act, or of other Federal acts of paramount authority. Only one section of the Indiana State Banking Act was held to be in conflict with the plain provisions of the Federal Law in question, relating to a system of equal distribution specifically provided by the Federal Law. While that section was unenforceable, the Act generally was sustained as a proper exercise of the police power of the State of Indiana.

On the other hand, and in reply to these and similar cases cited by the appellees to sustain its preemption theory, the appellants cite *Mohawk Mfg. Co. vs. Cavicchi*, 308 U. S. 522, 60 Sup. Ct. 294, wherein the appeal was

dismissed "for want of a substantial Federal question" (citing many cases). That case came up from the Court of Appeals of New York, wherein it was held:

"that Article 84 of the Civil Practice Act (as applied here to a cause of action arising under the patent laws) is not repugnant to Article 1, Section 8 of the Constitution and does not offend Section 256 of the Judicial Code."

The appellees on pages 47, and 58, and 59 of their brief, assert that the state statute *discriminates* against the holders of copyrighted musical works, because it does not mention those protected under the *common law*.

Appellants answer the alleged discrimination, by stating that there could not possibly be such discrimination, for the very good reason that the moment a piece of music is composed the author is endowed with a common law copyright. He then has two elections: one is to file his composition with the Register of Copyrights for the purpose of publication; and upon doing so he immediately by operation of the copyright statute, accepts the provisions thereof in lieu of his former common law right. If, on the other hand, the common law copyright owner does not desire, or fails to avail himself of the copyright act, and still wishes to deal in public performance rights, he could not possibly do so without releasing his copyright by dedication to the public when he granted and parted with his public performance rights for profit. *R. C. A. vs. Whiteman*, 114 Fed (2d) 86.

Therefore, in dealing with public performance rights there could be no discrimination between the two. This statement is clearly explained in the opinion Justice Day

delivered for the Court in *Caliga vs. Inter Ocean Newspaper Co.*, 215 U. S. 182, 30 Sup. Ct. 38.

Appellants answer the proposition set forth in appellee's brief, at page 59 thereof, concerning discrimination in the statute, because it applies to composers residing within the United States, and has no application to foreign composers who might come into the State of Nebraska and take over the field. Appellants' reply to that situation is that the legislature of Nebraska will meet that proposition when and if it arises. Let us hope not.

On page 54 of appellees' brief, they cite *McFarland vs. American Sugar Refining Co.*, 241 U. S. 79, as their authority that appellees' property rights are being taken in violation of the Fourteenth Amendment, and that the statute is a bill of attainder.

The *McFarland* case as viewed by the appellants refers to a complicated series of factual matters in reference to the sale and the production of sugar in Louisiana, that seem to have no relation to the provisions of the State Statute, nor to the facts in the case at bar. The lower court found that the practices in the sugar case were not monopolistic in character. Therefore, the *McFarland* case is not in tune with the record before this Court because the appellees' activities herein as a price-fixing monopolistic combination dealing in public performance rights have been proven to be definitely within the prohibitions of Section 1 of the Nebraska Statute. There is a definite close relationship established.

In reply to the question of "presumptions of guilt" the Nebraska statute is far different from that in

Louisiana on that subject, because the Nebraska Act states (Appellant's Brief, p. 138):

"it shall be prima facie evidence against any party to such action of the existence of such unlawful combination for the purposes in this Act enumerated, if a substantial number of all authors, composers, proprietors, publishers, owners or their heirs, successors or assigns of copyrighted vocal or instrumental musical compositions in the United States, are shown to be members of any society, association, club, firm, partnership, corporation, group or entity."

The statute is not unreasonable. It announces only the elementary rules of evidence that would be applicable to any anti-trust suit, i. e., that if the facts stated in the statute were proven at trial, a prima facie case would have been established in any event by evidence. It does not mean conviction. Any prima facie case may be rebutted.

In the case of Morrison vs. California, 291 U. S. 82, cited by the appellant on page 57 of their brief, the term "presumption of guilt" is used, as in the *McFarland* case.

The Nebraska Act defines what shall be necessary to make out a "prima facie case," which is far different than the presumption of guilt. The facts in connection with the *Morrison* case are not in point, because there an alien was *presumed* to be guilty of a violation of the Immigration Laws, if he could not show and prove where he was born.

On pages 61 to 68 of appellees' brief, they set forth cases and argument that the State Statute cannot be justified under the police power. However, they cite no

cases that require reply. Appellants believe they have analyzed that subject fully under Points II, III and IV on pages 68, 69 and 70, of appellants' brief.

On page 68 of appellees' brief, they assert the state statute impairs obligations under existing contracts, in violation of Article 1, Section 10, of the Federal Constitution. Appellants reply to that position by first suggesting what contracts are impaired. If they mean the contract existing between the unlawful monopoly and the members in reference to public performance rights, then there is ample authority that such contracts are not within the purview of the Federal Constitution, for obvious reasons—assuming, of course, that all the appellees are a part of a combination that is found in a proper case to be illegal under Section 1 of the Act.

The Supreme Court of the State of Nebraska in *State vs. Adams Lumber Company*, 81 Neb. 412, quoting from 166, U. S. 290, holds:

“ * * * When, therefore, the body of an act pronounces as illegal every contract or combination in restraint of trade or commerce among the several states, etc., the plain and ordinary meaning of such language is not limited to that kind of contract alone which is in unreasonable restraint of trade, but all contracts are included in such language, and no exception or limitation can be added without placing in the act that which has been omitted by congress.’ This language is pertinent to the act under consideration so far as trade or commerce within the state is concerned, since the Nebraska law is almost a literal copy of the Sherman Act, changing only its field of operation. In *Northern Securities Co. v. United States*, 193 U. S. 197, 331, the Sherman law was held to embrace and declare to be illegal every contract, or combination or conspiracy of whatever form, of

whatever nature, and whoever may be parties to it, which directly or necessarily operated in restraint of trade or commerce. This is the proper construction to be placed upon our statute, * * *."

In a suit brought by a trust or a monopoly to collect for goods, wares or merchandise sold, a defense of anti-monopoly of the plaintiff may not thus be collaterally set up to defeat collections. But in the case at bar we are confronted with no such proposition of law. Furthermore, if the combination is declared unlawful under the terms of the Nebraska Act, it is elementary that its further right to contract would necessarily terminate. The Nebraska Statute itself, however, does provide in Section 9 (D) (Appellants' Brief 147) for the adjustment of all property rights between all of the parties and those that might have an interest and intervene therein, so that no one may be denied their day in court under existing contracts.

Appellants cite the case of *Carl Laemmle vs. Stern*, 219 Fed. 534, as authority for the fact that a state court has the right to adjudicate all matters in connection with contracts, property rights, ownership, and all other matters *save infringement*, in reference to any copyright.

Thus, Section 9 (D) of the Nebraska Statute is in aid of, and not in derogation of, the National Copyright Act.

On page 69 of the brief of appellees the claim is made that the Fourteenth Amendment is violated, because it interferes with the use of the interstate business of the appellees; the Act requires the fixing of prices upon sheet music and phonograph records coming from

outside the boundaries of the state into the state. Appellants' reply to the sheet music phase, by stating that the appellees have no concern with sheet music. They admittedly have no interest therein, nor contracts with their members in reference thereto. Furthermore, sheet music is sold now by direct arrangement between the composers and the various publishing houses, one in open competition with the other, and the royalty of three cents is collected in the purchase price when the sheet music is sold over the counter.

The Nebraska Act does not provide in Section 2 (A) that the individual composer shall fix the price for private performance rights when sold. But the evidence is clear that such plan is now being followed by all of the individual appellees and all of the music publishing houses that go to make up ASCAP, and is not an issue on this appeal for any purpose.

As far as phonograph records are concerned, ASCAP is in no way concerned with them. The composer and his publisher make an arrangement with the manufacturer of the records, and the Copyright Law provides that the composer or publisher shall receive two cents for each record so manufactured. This is all by private contract, except the price. Each publishing house and its composers competes with the other publishing houses and with the various manufacturers of phonograph records for the recording business (R. Vol. II, 722). ASCAP is not concerned therein—excepting that the record shows

that ASCAP *claims* that a phonograph record that has thus been bought and paid for may *not* be played in a hotel or public place, directly or indirectly, for the indirect profit of the establishment where played. Appellants do not concede that right. If the public performance rights on records are to be reserved and must be paid for each time played in addition to the original sale price, then the Nebraska Act requires that those public performance charges of the composer be made known by a label upon the record, so that the purchaser if he wishes the public performance right for profit, might purchase it, at the time that the ownership of the chattel is alienated by purchase. If he does not do so appellants contend the right is lost under the copyright law, and that the state statute (Sec. B) is really a reiteration in that regard to the national law.

Therefore, appellants reply there is no violation of the Fourteenth Amendment because sheet music is not in question, and phonograph records are not in question, excepting when publicly performed within the state after the disc or record or sheet music has come to rest and has become personal property within the State of Nebraska, and its use within reasonable limitations is within the police power of the state, under the Tenth Amendment.

The last proposition of appellees is set forth on page 75 of their brief, wherein they state that the whole statute must fail because the various sections cannot be

separated. In reply, appellants call the Court's attention to the words used by the appellees, "various sections." Certainly, "various sections" cannot be separated one from the other, but Sections 2 (A) and 2 (B) and 2 (D) (Appellants' Brief, 138, 139 and 140) may be separated from the balance of the Act, because they deal with the individuals, and the balance of the act deals with the unlawful combination and all of the enforcement provisions in reference thereto.

The appellants on pages 114 to 131 of their own brief, in the argument to sustain Law Points VIII and IX, cited ample authorities in reply to the appellees' final point on page 75 of appellees' brief. Appellees have clearly failed to answer wherein the cases cited under Point VIII on page 73, and under Point IX on page 74 of the appellants' brief, lack soundness in principle. Those cases apply directly to the "inseparability" and "inducing cause" features that were injected into the case at bar for the first time in the opinion of the Court on December 28, 1940, and were never raised as an issue by appellees, and were abandoned when the findings of fact, and conclusions of law, and decree were finally entered (R. Vol. I, 133-9).

In the brief of the appellants under the heading of "Conclusion," on page 131, the position of appellants in regard to appellees' final proposition is made clear and need not be further amplified in this reply brief.

CONCLUSION

The appellants respectfully request this Court to comply with the conclusion set forth in the "Brief of Appellants," at page 131 thereof.

Respectfully submitted,

WALTER R. JOHNSON,
Attorney General of Nebraska.

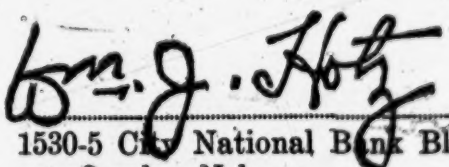
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Attorney for Appellants.
Dated Omaha, Nebr., April 26, 1941.

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APPENDIX**APPELLANTS' OPENING STATEMENT PREPARED
FOR ORAL PRESENTATION TO THE SUPREME
COURT OF THE UNITED STATES ON APRIL
28th, 1941.**

1. This case comes before the Supreme Court by direct appeal from a United States District Court in Nebraska. That tribunal was a three-judge Federal Court sitting by virtue of the authority of Section 266, and the appeal to this Court is under the authority of Section 238 (3) of the Judicial Code. The lower court consisted of United States Circuit Judge Gardner from the Eighth Circuit, United States District Judges Munger from the Lincoln, Nebraska, Division, and Donohoe from the Omaha, Nebraska, Division.

2. The case was in equity and tried without a jury. The complainants were the American Society of Composers, Authors and Publishers, which appellants have in the proceedings called "ASCAP," a New York corporation doing business in Nebraska, together with a number of the members of the Association, in their individual capacities, as music publishers and composers. They sought to restrain the enforcement of a Nebraska legislative bill that declared unlawful the operations of any association or combination of composers and publishers of copyrighted vocal and instrumental musical compositions that fixed prices for public rendition rights for profit in restraint of trade. A temporary injunction was granted and no appeal taken from that interlocutory order. A full hearing on the merits was held in 1939, and a permanent injunction was granted against the defendants below, who are the law enforcing officials of the State of Nebraska, consisting of the Governor, the Attorney General, the Secretary of State, the State Treasurer, the State Auditor, and most of the County Attorneys of the State. The enforcement of the bill which the final injunction permanently enjoined became a law on May 17, 1937.

3. The complainants' suit to restrain was filed on June 8, 1937. Thus no decision was had on any of the questions involved, by any Nebraska State Court.

4. The defendants below will be referred to as "Nebraska." These appellants have perfected their appeal before this Court, which has noted probable jurisdiction. The lower court passed in favor of its jurisdiction on the amount involved, and no error is before this Court on any question of jurisdiction. The complainants below are the appellees before this Court.

5. The complaint below sought to restrain the enforcement of the Nebraska legislative bill upon many constitutional grounds, *primarily*: that all of the provisions of the State legislative bill were in violation of the National Copyright Law; and the constitutional provisions in reference to copyrights; the equal protection; the due process; the commerce; the contract; and the severe penalty provisions of the Federal Constitution; and also the equal protection, the contract clauses and the protection against severe penalty provisions of the Nebraska Constitution.

6. I represent as Special Assistant to the Attorney General of the State of Nebraska, all of the appellants before this Court. The Attorney General, Mr. Walter R. Johnson, and his assistant, Mr. Riddell, appeared in the court below at the hearing on the merits and in the various steps leading up to this appeal, and are here as representatives of the State of Nebraska on this appeal.

7. There are no private parties who have intervened or are represented by the appellants in this case on appeal.

In the court below, the defendants denied violation of any of the constitutional provisions, and asserted the State's right to pass anti-monopoly legislation directed against the incorporeal right or franchise known as the "public performance right for profit," of copyrighted vocal and instrumental musical compositions.

9. To raise an issue directly against the particular complainant, ASCAP, the defendants below for their further answer alleged that

"The complainant American Society of Composers, Authors and publishers is an unlawful combination of a substantial number of the owners of copyrighted vocal and instrumental musical compositions within the United States; that said unlawful combination operates within the State of Nebraska by unlawfully and wrongfully fixing prices within the State of Nebraska in restraint of trade and contrary to all the provisions of the act; and that it does unlawfully and wrongfully exact fees and licenses within this state in violation of the terms of said act; that said Society does control substantially all the public performance rights of all the copyrighted vocal and instrumental musical compositions used within the State of Nebraska, in violation of the terms of said act, and that it does through its publisher members actually own and control substantially all the copyrighted musical compositions for use within this state, and in violation of the terms of said act, and actually does fix and control prices for its use for all purposes within (fol. 114) Nebraska, contrary to the provisions of the act.'

10. Thus there was presented to the court below at the hearing on the merits the legal questions of whether or not the act itself, based upon the issues presented, violated the Federal Constitution or the National Copyright Law, or both, and the further question of whether or not this particular plaintiff, ASCAP, was such unlawful monopoly as defined in the Act so as to bring it squarely within the provisions of the anti-monopoly statute in question.

11. A digest of cases will show that for the first time in its existence of 25 years, ASCAP's method of doing business and its corporate affairs were made a matter of court record. The two volumes of printed record of over 1,000 pages and many exhibits is before this Court. From it we find the explanation of many problems in reference to public performance rights for profit.

12. ASCAP in recent years in Nebraska filed against our citizens over 100 infringement suits; and if propor-

tionate throughout the nation possibly a total of 6,000 infringement suits have been prosecuted by it during the same period in the nation.

13. In none of this vast number of cases were the issues now before this Court presented for decision.

14. On December 28, 1939, the lower court rendered its opinion, and found the following facts (App. Br. 9-12). There is no cross-appeal in this case:

a. That ASCAP is made up of approximately 123 music publishing houses, which constitute the principal music publishers of the country.

b. Each of these has assigned to the Society the exclusive right of public performance for profit.

c. There are 44,000 composer members of foreign countries, authorizing ASCAP to deal exclusively for them. ASCAP issues blanket licenses for public performance rights for profit.

d. In Nebraska there are 350 dance pavilions.

e. There are ten radio stations operated within the state, of which one is affiliated with the Columbia and one with the National Broadcasting Networks. The other stations initiate their own vocal and instrumental musical programs within their studios in Nebraska.

f. A large number of theatres in Nebraska are users of music.

g. There are 284,000 radio receiving sets in private homes in Nebraska.

h. One-third of the population of the State at some time during the year attends dances or balls where music is played.

i. ASCAP has 391 signed contracts with music users within the State of Nebraska.

j. In 1938 these users in Nebraska paid approximately \$70,000 to ASCAP.

k. The largest radio station in Nebraska pays about \$26,000.00 annually to ASCAP.

l. There are many small users of music in Nebraska.

m. ASCAP is given by its members the exclusive right to make collections, fix prices, and otherwise carry on the business of public performance rights on all the musical compositions it controls.

n. Of the popular music necessary for the successful operation of radio stations, dance halls, hotels, and theatres, ASCAP has control of about 85% or 90%, and also controls from 50% to 75% of the standard or older music that is occasionally played.

o. ASCAP's income from public performance rights in the United States in 1938 was approximately \$6,000,000.00.

p. All of the large and more influential publishers of music in the United States are members of ASCAP.

q. The users of music in Nebraska cannot successfully carry on their business except they deal with the plaintiff society, because there is no place where any person or agency to whom users of music in Nebraska may go in order to deal for public performance rights and negotiate for music in any substantial amount sufficient to meet the ordinary needs in the state, except the society.

r. The income of ASCAP is divided, fifty per cent to the composer members, and fifty per cent to the publisher members. These groups are classified by the Board of Directors of ASCAP by a Classification Committee of its own.

s. The court further found that whether or not, under the common law of Nebraska, the contracts between ASCAP and its members and the users were valid or not, need not be considered, and that the only issue before the court was the constitutional validity of the challenged statute.

t. The court further found that prior to the organization of the plaintiff society in 1914, the composer had no practical means of enforcing the exclusive right given him by the Copyright Act.

u. That users of music were unable to ascertain who the copyright owner was and to whom to go.

v. It was for the purpose of protecting the legal rights of its members in their copyrighted musical compositions against infringement that the Society was organized.

15. In the opinion of December 28, 1939, the lower court also held as follows (App. Br. 22-27):

1. "The control or prohibition of combinations in restraint of trade and the prohibition of monopolistic practices is recognized as a proper exercise of the public power of the state."

2. "The Act of March 4, 1909, Chap. 320, Sec. 1 (E), 35 Stat. 1073, Title 17 U. S. C. A. Secs. 1-63, enacted pursuant to the grant of power in Article 1, Section 8 of the Constitution, was intended to grant valuable enforceable rights to authors and publishers without burdensome requirements, in order to afford greater encouragement to the production of literary works of lasting benefit to the world. *Washington Pub. Co. v. Pearson*, 306 U. S. 30. The policy and purpose of the statute is to grant to the individual the right to control the use of the production covered by the copyright. Of course, the Act gives him no right to combine with others to insure control of prices and the consequent power of monopoly of an entire field by combination. Plaintiffs urge necessity as a justification or warrant for their organization. It is urged that without some such means of protection, the individual copyright owner is helpless to protect his rights, but if the statute violates no rights guaranteed to the plaintiffs by the Constitution or laws of the United States, the motive for the organization or acts of ASCAP, however, impelling, is not material."

3. "Section 2 (a) of the state statute requires the author, composer or publisher to specify legibly upon the musical composition, in whatever form it may be published, 'the selling price thereof for private rendition or public rendition for profit if made available for such public rendition so arrived at and determined for all uses and purposes.'"

4. "Section 2 (B) of the statute provides that, "In the event any author, composer or publisher, or any of his heirs, successors, or assigns, fails or refuses to affix on the musical composition

the selling price, and collect the same, for private and public performances for profit, at the time and in the manner specified in this Act, then any person, firm or corporation in this state who may have purchased and paid for such copyrighted musical composition may use the same for private and public performance for profit within this state without further license fee or other exaction; and such person, firm or corporation, so using or rendering the same shall be free from any and all liability in any infringement or injunction suit, or in any action to collect damages, instituted by such copyright proprietor or owner in any court within the boundaries of this state.'

"The state statute contains a separability provision (Section 12), which provides that,

" 'If any section, subdivision, sentence or clause in this Act shall, for any reason, be held void or non-enforceable, such decision shall in no way affect the validity or enforceability of any other part or parts of this Act.' "

The court then held in reference to Section 2 (B) as follows (App. Br. 26):

"This provision, we think, clearly deprives the owner of the copyright of rights to which he is entitled under the Copyright Act. As observed, his rights of ownership entitled him to sell or offer to sell, or to withhold from sale, as he may choose."

The court further held (App. Br. 27):

"The rule is that, although a statute may be invalid or unconstitutional in part, the other parts will be sustained where they can be separated from the part which is void.

"But where the connection between the invalid parts and the other parts of the statute is such as to warrant the belief that the legislature would not have passed the act without the invalid parts, the whole act must be held inoperative. The provision of this statute which we are here considering is such an essential part of the statute as not to be separable.

"In view of our conclusion on this phase of the case, it is unnecessary to consider the other contentions that have been ably argued and elaborately briefed by counsel for the respective parties.

"We conclude that permanent injunction restraining the enforcement of this statute must be granted. Counsel for plaintiffs may prepare findings of fact and conclusions of law, together with form of decree in accordance with this opinion."

16. In addition to the facts found and set forth in the opinion, the record stands undisputed that the following facts were established and there is no cross-appeal by ASCAP (App. Br. 63-65):

- (1) That, contrary to its claim of being a protective association for its members, ASCAP is a very substantial business organization paying \$30,000 a year rental for its New York office (R. Vol. I, 262).
- (2) That it pays each of its officers, Buck and Mills, \$50,000 annually together with large bonuses and other emoluments, and to its secretary Paine \$25,000 per year (R. Vol. I, 208; 211).
- (3) That no fee or license is charged the radio networks dealing in interstate commerce but only the local radio station for such public performance of ASCAP compositions as are reproduced or presented originally in the Nebraska studios (R. Vol. I, 263).
- (4) That the entire operations of ASCAP are so carried on as to be within the state as intrastate transactions obviously and ostensibly to avoid, in the slightest degree, interference with interstate commerce (R. Vol. I, 263; 398-400; 455-8).
- (5) That over 100 infringement suits were instituted by ASCAP in the past ten years in the Nebraska Federal Courts, all of which were dismissed when and if contracts were signed by the users with ASCAP on ASCAP's terms (R. Vol. II, 861-866),

- (6) That there has been a gradual enlargement in the fees charged year by year; and that the users of music are helpless and must pay the price dictated by ASCAP if they use music commercially in their business enterprises (R. Vol. I, 433; 367-8; 380-6, 396-8).
- (7) That many thousands of dollars are invested by the users of music in the State of Nebraska in theaters, broadcasting stations, hotels, amusement parks, halls, and pavilions; and that these investments would be adversely affected without the use of music of the type and kind controlled almost exclusively by ASCAP (R. Vol. I, 365-7; 397-400; 410-12).
- (8) That the classification committee of ASCAP (Its Art. of Assoc.) (R. Vol. I, 64; 70) divides one-half the net income to composer members, classifying them arbitrarily in groups so that approximately 100 to 150 of the composer members receive approximately all of the composer money (R. Vol. I, 203-9); that these funds are annually paid as if dividends or earnings, and not as royalties to each composer on his music (R. Vol. I, 201-206; 64; 70).
- (9) That the radio broadcasting companies in Nebraska are compelled, in contracting with ASCAP, to pay it 5% of the station's entire gross receipts, no matter from what source received, together with a sustaining fee, irrespective of whether the radio station used ASCAP or any other music, or no music, on a particular program (R. Vol. I, 396; 428; 402; 407; 408; Vol. II, 814, 794-6).
- (10) That ASCAP refused to furnish the list of its compositions, the public performance rights of which it claimed to control, so that the user might protect himself against an innocent infringement in his establishment (R. Vol. I, 447; 403).

17. On January 25, 1940, the lower court entered its formal findings of fact, conclusions of law and decree (App. Br. 12-21).

18. The findings of fact as to the activities and control and operations of ASCAP were substantially as in the previous opinion set forth, but nowhere in the final papers was any reference made to the unconstitutionality of Section 2 (B), the unconstitutionality of any of the other sections of the Act, nor was the separability and the inducing cause features contained in the findings of fact, the conclusions of law or decree. In fact, in no place in the final papers was it found as a matter of fact, or concluded as a matter of law, or decreed, that the legislative Act in question was in violation of the National Copyright Act, nor any provision of the Federal Constitution or the State Constitution.

19. After stating substantially the foregoing facts the court's "Conclusions of Law" were as follows (App. Br. 18):

"I. On the Findings of Fact, the court concludes as a matter of law that complainants are entitled to a decree permanently enjoining the defendants, their deputies, their successors in office, and all persons acting for or on behalf of them, or either of them, and each of them, from bringing or permitting to be brought, directly or indirectly, any proceeding at law or in equity for the purpose of enforcing said statute against complainants and others similarly situated, their representatives, employees, agents, or any of them, and from prosecuting originally any members of the said American Society of Composers, Authors and Publishers, including complainants, their representatives or agents, or any of them, for violating any provision of said statute."

20. The decree restrained the state officers from interfering with the appellees,

"for doing any legal act to enforce their respective rights under the Copyright Act in the Federal Courts of the State of Nebraska or elsewhere, and generally from doing any act or thing to carry out or enforce

any of the provisions of said State Statute" (App. Br. 21).

21. On February 5, 1940, the defendants below filed a motion for a new trial with 22 affidavits attached (App. Br. 28-56).

22. The motion challenged the court's attention to the difference in the opinion and the findings of fact and conclusions of law in reference to the separability and the inducing cause matters set forth in the opinion and omitted from the findings of fact, conclusions of law, and decree.

23. The 22 affidavits were from a majority of the legislators of the State of Nebraska, stating that they voted affirmatively for the bill in question, because of its main anti-monopoly features and the enforcement and penalty provisions of the Act in reference to the combination declared unlawful, and that Sections 2 (A) and 2 (B) and 2 (D) all deal with the individual composer and were not the inducing cause for the affirmative votes of the legislators.

24. The court overruled the motion for the new trial and thus accepted as final and conclusive its findings of fact, conclusions of law and decree, and thereby as appellants contend, abandoned the inseparability features of the one unconstitutional section of the Act, which the court in its opinion stated, was inseparable from, and was the inducing cause for, the enactment of the statute.

25. Therefore, on appeal, this Court is confronted with an opinion that should be treated as supererogatory, and was so treated by the lower court. For the purpose of this appeal the Court should review only the findings of fact, conclusions of law and decree as entered on January 25, 1940, to *determine reversible error*.

26. On June 27, 1940, when the petition for appeal was presented and allowed and citation issued, the appellants filed fourteen assignments of error (App. Br. 57-67).

Principally, these assignments stated that after the court had found the facts, heretofore related in both its opinion and findings of fact, it erred in granting the

injunction against the enforcement of the statute against the combination that was proved to be unlawful and operating within the State of Nebraska as a price-fixing monopolistic organization acting in restraint of trade, as defined by the particular statute in question. Further that the findings of fact and conclusions of law set forth no proper grounds to sustain the final permanent injunctive decree.

27. There are nine points relied upon for reversal (App. Br. 68-74). These points are briefly as follows:

POINT NO. I.

"While copyrighted vocal and instrumental musical compositions may grant individual monopolies, they cannot be unitedly exercised to restrain competition and to fix prices; and a suit to enjoin such combination to restrain commerce and trade in copyrighted musical compositions is not one arising under the Copyright Laws of the United States."

POINT NO. II.

"There is nothing in the Constitution of the United States which precludes a state from adopting and enforcing statutes which secure competition and preclude combinations which tend to defeat it; and the state is the sole judge within reasonable limitations, of what laws shall be enacted for the protection and welfare of its people and as to when and how the police power of the state shall be exercised."

POINT NO. III.

"The state may pass such reasonable regulations in reference to the sale and use of copyrighted material by the individual owner and his publisher within the State of Nebraska as its legislature may deem proper, when the enactment is not prohibited by the Copyright Act nor in derogation of it."

POINT NO. IV.

"A state statute prohibiting monopolies in copyrighted vocal and instrumental musical compositions

does not militate against the commerce clause of the Federal Constitution when the acts of the unlawfully combining conspirators are so carried on as to be intrastate transactions."

POINT NO. V.

"The penalties of an anti-monopoly statute may not be considered so drastic as to be nonenforceable and to deprive those affected by it of the due process and equal protection clauses of the State and Federal Constitutions, when the act itself gives full and complete protection in the courts, and when the penalties for violation are from \$1.00 to \$5,000, and when the criminal provisions provided are misdemeanors with penalties not to exceed one year in prison, and when such fine or imprisonment may be imposed only after a full and complete hearing on the merits in the courts of the state, and when jury trial is guaranteed by the act and the Constitution of the State. The court may consider similar penalties in other anti-monopoly statutes in Nebraska and in the nation as an aid in sustaining the act."

POINT NO. VI.

"Where there is a conflict in the considered opinion of the Court and the findings of fact, conclusions of law, and decree subsequently entered, the opinion will be considered supererogatory; and the findings of fact, conclusions of law, and decree only will be considered on appeal."

POINT NO. VII.

"If a three-judge Federal Court, sitting under the provisions of Section 266 of the Judicial Code, in its findings of fact, conclusions of law, and decree makes no finding, conclusion, or decree that a state statute permanently enjoined is violative of a Federal statute or the Federal or State Constitution, the Supreme Court of the United States in reviewing the case is justified in reversing the cause, dissolving the permanent injunction, and ordering the case dismissed because the basis for the three-judge federal

court's jurisdiction is the repugnancy to a Federal statute or some provision of the Constitution."

POINT NO. VIII.

"If on appeal to the United States Supreme Court in an action brought under Section 266 of the Judicial Code, wherein the lower court granted a permanent injunction, the appellate court should consider an opinion rendered by the lower court previous to the findings of fact, conclusions of law and decree, holding that one subsection of the Act in question was inseparable from the balance of the Act, and was the inducing cause for its passage, and for that reason declared the entire Act nonenforceable, then the appellate court should re-examine such question and sustain the enforceability of all the balance of the Act, when it is clear that after striking out the unconstitutional part of the statute, the residue is intelligible, complete, and capable of execution. Especially is this true when the state court has never passed upon the question."

POINT NO. IX.

"The issue of whether or not a particular subsection of an act was the inducing cause for its passage is a matter of legislative intent which must be pleaded in order to raise the issue; and if not so raised, the trial court errs in any findings or ruling on the subject. It is proper for the parties adversely affected by such erroneous ruling to call the trial court's attention thereto in a motion for rehearing and a showing by affidavits of a majority of all the legislators who voted for the act that said subsection was not the inducing cause for its passage nor for their affirmative votes."

ARGUMENT TO THE COURT PREPARED FOR ORAL PRESENTATION

The legislative act in question (App. Br. 135-150) is divided into two main parts, separately sectioned, numbered and paragraphed.

1. Section 1 is directed against a combination of composers and publishers, who so combine to fix and collect license fees for public performance for profit of copyrighted vocal and instrumental musical compositions for use within the state, providing the members of such combination are made up of persons, firms or corporations constituting a substantial number of those within the United States who own or control copyrighted vocal and instrumental musical compositions. The appellee, ASCAP, has been proven to be such an unlawful combination and does so operate within the State of Nebraska in contravention of Section 1 of the Act.

2. Section 1 of the National Copyright Act grants exclusive rights in five separate items therein defined. The appellee, ASCAP, is concerned with only one of those rights, namely, "to perform the copyrighted work publicly for profit, if it be a musical composition, and for the purpose of public performance for profit."

The Nebraska Act uses the same identical language (App. Br. 138-9).

3. Section 5 of the National Copyright Act sets up thirteen (13) classifications of works for copyright registration. The use of only one, designated as "*musical compositions*," is covered by the Nebraska Statute.

4. The other twelve classifications defined in the National Copyright Act, and in which many copyright owners may be interested, are not the subject matter of the Nebraska statute, nor does the appellee, ASCAP, claim herein nor has it asserted any rights in any of the other twelve classifications for copyright registration, save and except, as stated, the "public performance rights for profit of musical compositions." Neither the appellants nor the appellees, are interested in the classification described as "dramatico-musical compositions," or "motion pictures," "photoplays," or motion

pictures other than photoplays. The appellee, ASCAP, concedes that it neither owns, sells nor publishes any music or music equipment; that its combination of composers and publishers deals only in what is known as the "small" public performance rights in vocal and instrumental musical compositions, as distinguished from the "grand" rights—such as the right to make moving pictures, dramatico-musical entertainment or plays, or any of the other classifications eligible for registration under the National Copyright Law.

5. There exists no combination of copyright owners or their assigns of any of the twelve other classifications designated for registration by the National Copyright Act. The testimony of the witnesses is clear in that regard. Each is in competition with the other, in those twelve other classifications, as well as in the promotion of their sheet music sales, their dramatic creations, their recording rights on phonograph records, and all other rights granted under the Copyright Act. These rights are all separable. There exists no combination in restraint of trade as a price-fixing monopoly in any of the other twelve classifications defined by the National Copyright Act. It remained for ASCAP alone to build up over a period of the last several years a complete monopoly in the "small" public performance rights of vocal and instrumental musical compositions, as demonstrated clearly by the opinion and the findings of fact of the court below, and which remain unchallenged in that factual particular, on this appeal.

6. The individual appellees are members of the combination declared unlawful by Section 1 of the Nebraska Act. Some of these individuals deal in dramatico-musical copyrights; in recording rights; in photoplays; and in moving pictures; and all of them more or less in the sale of sheet music that is used for private performance. But the Nebraska Statute in none of its parts makes any reference to any of these rights granted to the appellees under the National Copyright Law; consequently, they should be eliminated from consideration in this case. A careful reading of the Nebraska statute will prove the

accuracy of the appellants' position. Therefore, the reference made by the lower court in its opinion to these various other rights under the National Copyright Act, was obiter dictum.

7. Furthermore, the Nebraska Act in no way prohibits a combination of copyright owners of vocal and instrumental musical compositions from combining for the purpose of investigating infringements; establishing facts upon which to base their fees for licenses; nor does it prevent ASCAP from aiding and assisting in the protection of the rights of any of its members under the National Copyright Law; or to combine together for the purpose of bettering their conditions; enlarging their markets; simplifying procedure; encouraging the use of music; nor to otherwise indulge in activities for the benefit of its members. It only prevents substantial numbers of copyright owners from combining together to fix prices for public performance rights of vocal and instrumental musical compositions in restraint of trade; and of dividing up the income thus collected by the unlawful combination among its members as dividends, rather than as royalties for the individual copyright owners. Nowhere in the Act does it prohibit anyone from fixing and determining prices for public performance rights for profit; or making collections in whatever manner the composer and his publisher might desire so long as they do not combine in substantial numbers to fix prices and control the sale of public performance rights for profit in restraint of trade in those rights in Nebraska.

8. Under Law Point I (App. Br. 68), appellants have cited a number of well considered cases, sustaining the validity of Section 1 of the Nebraska Act, and all of the enforcement provisions in reference thereto.

9. Under the terms of the Sherman Anti-Trust Act, and various state anti-monopoly statutes, the question has frequently arisen, whether or not the intangible or incorporeal right known as "public performance" fell within the definition of "commodities," or "material," or "products," as set forth in those anti-monopoly stat-

utes. It has herefore been variously decided in reference to different intangible rights. But the legislature of the State of Nebraska under its police power reserved the right to declare as unlawful, when acting within the boundaries of that state, any combination that dealt unlawfully in most anything, including franchises or other intangible rights or privileges, among which are "public performance rights."

10. Therefore, whether the dealing in public performance rights is "trade" or "commerce" or is a "product" or "commodity," is immaterial in the consideration of the Nebraska statute, because it especially legislated against an unlawful combination in public performance rights in copyrighted vocal and instrumental musical compositions.

11. It has been repeatedly held that the National Copyright Act, because it granted the individual a monopoly for a limited number of years, was no defense to an attack under an anti-monopoly statute directed against those who combined those rights to fix prices in restraint of trade.

12. The lower court so held in its opinion of December 28, 1939 (App. Br. 9). No cross-appeal has been lodged as above stated.

13. The lower court has held that the common law copyright is not a question in this case. But the appellees claim that the Nebraska Act is faulty because it does not include the common law copyright, and therefore is discriminatory. This position is unsound because the composer loses his common law copyright right the moment he obtains his publication rights under the National Copyright Law and generally publishes or sells those rights. Therefore, there can be no conflict in that regard. Furthermore, the common law copyright is lost the moment the composer offers his rights generally for public performance for profit. Thus the common law copyright should be disregarded in this appeal.

14. Under Law Point Number II (App. Br. 68), a number of cases have been set forth that prove that the state in the exercise of its police power is the judge

of the content of its legislation, and even though it may be unwise in the mind of a reviewing court, or even impractical and perhaps not the best in the court's views, nevertheless it should be held valid under the Tenth Amendment.

15. Therefore, if the legislature of the State of Nebraska wishes to curtail the activities of an unlawful combination, dealing in public performance rights, and if the legislators found that the many music users in their state are best protected by a statute which prohibits such combination, then the legislative decision in the matters should not be disturbed by the judicial branch of our government.

16. Under Law Point III (App. Br. 69) a number of well reasoned cases have been cited, which are authority and precedent for the State of Nebraska to pass reasonable regulations in reference to every use that may be made within the State, of copyrighted musical compositions, as long as the provisions are not in derogation of, or in conflict with, the National Copyright Law.

17. The decisions under Law Points I and III of the appellant's brief announce a very definite principle in reference to the National Copyright Law, which is: *that the field of copyright use and performance has not been preempted by Congress.* Only in a very limited particular has Congress legislated, and that is by granting the exclusive right, with the power of assignment, to the individual, for a limited number of years and the right, inferentially, to determine his own price and to collect compensation for those rights from the user. Nowhere in the National Copyright Law is there authority for the ASCAP organization to carry on within the State of Nebraska, in the manner found by the lower court.

18. ASCAP contends that unless an organization operates as it does in connection with public performance rights, the authors and composers of vocal and instrumental musical compositions would have no way of collecting for those rights; that it thus deals because of necessity. Such argument has been answered in the

numerous decisions set forth in appellants' brief. In the language of this High Court it has been repeatedly stated that necessity and convenience, even though producing a more practical result, is no justification for an otherwise unlawful monopoly. The lower court recognized these principles of law, but in its opinion, rendered on December 28, 1939, after a full and complete hearing (App. Br. 22), the court surprised counsel for the appellants by announcing that Section 2 (B) and indirectly 2 (A) of the Nebraska Statute, which dealt with the individual composer, was the inducing cause for the passage of the entire act and inseparable therefrom, and was unconstitutional because in derogation of the National Copyright Law, and for that sole reason declared the whole statute unenforceable.

19. Under Law Point IX (App. Br. 73), appellants have raised the same point they did in the court below in its motion for rehearing and in its assignments of error, i. e., *that such issue should have been plead*, and should on appeal be disregarded for that omission.

20. However, there is justification in the record for the conclusion that the lower court abandoned this inseparability feature, for when the findings of fact, conclusions of law and decree (App. Br. 12-21) were signed and entered, no mention was made therein of the "inducing cause" and "inseparability" features that were set forth in the previous opinion of the court. Furthermore, when the lower court's attention had been called to this omission, by timely motion for new trial or rehearing, and the same was argued before the three-judge Federal Court, it overruled that motion and, as appellants contend, abandoned that issue and adopted only the court's findings of fact, conclusions of law, and decree as entered, without the inseparability feature as a basis for invalidating the whole statute.

21. Those findings of fact and conclusions of law do not sustain the decree for a permanent injunction because the findings reiterate almost entirely the findings of fact in connection with the unlawful activities; the strong monopolistic control; and the price-fixing features

of the ASCAP organization as set forth in the opinion. But the court justified its permanent injunction by its findings that it was *necessary* and *expedient* for ASCAP to so operate. Nowhere in the findings of fact or conclusions of law is it mentioned that any part of the act, either in reference to the individual or in reference to the unlawful combination, is in derogation of the National Copyright Law, or in conflict with any part of the Constitutions of the United States or the State of Nebraska.

22. Nevertheless the lower court restrained and enjoined *permanently* the law-enforcing officials of the State of Nebraska from carrying out any of the terms of the Act. Therefore, appellants contend that in the absence of adequate findings of fact and conclusions of law to sustain the decree, reversible error appears upon the face of the final papers from below and now before this Court for action and the cause should be reversed and dismissed.

23. There is no doubt that this Court does have the right to inquire into the basis for the opinion as well as the findings, if it so desires, and perhaps might treat the opinion other than supererogatory.

24. For that reason appellants believe it their duty to explain their position that Sections 2 (A) and 2 (B), either or both, are readily separable sections; and is a state problem that has never been decided by a state court.

25. Section 2 (A) (App. Br. 138), after stating that all authors and composers shall have within the State of Nebraska the full privileges conferred by the National Copyright Act, requires that the composer, in conjunction with his publisher, and independently of the unlawful combination defined by Section 1, shall fix upon his musical composition in whatever form it may be printed and published, the selling price thereof, either for private rendition, or if it is meant for public rendition for profit, the selling price thereof. Those words are copied from the National Copyright Law.

26. Section 2 (A) of the Nebraska Act does not compel or require the composer to grant public performance rights within the State of Nebraska, nor does it attempt to limit him in the matter of charges therefor. It states that the composer shall fix and determine at the time, when and if he sells his music for public performance and if meant for public performance for profit, the price for that purpose or any other purpose he wishes; and to make his collection therefor at the time he parts with his public performance for profit through the medium of the music arranged and sold for that purpose.

27. At this point, it is well to view a practical aspect of the business of publishing music. ASCAP is made up of all of the important or substantial music publishing houses in the United States, together with a limited number of composers. These publishing houses, according to the evidence, have acquired by outright purchase the ownership for all purposes the vast amount of copyrighted musical compositions in America. About twenty or more of these publisher members own large catalogs of music, which had been introduced as evidence in this case. The record so shows.

28. Section 1 of the Nebraska Act does not define as an unlawful monopoly a publishing house that owns copyrighted music, no matter how vast the amount might be. For example: Irving Berlin Company has approximately 10,000 pieces of music, in which all of the rights, excepting the public performance rights, are owned by that company. It has assigned only the public performance rights or "small" rights on "songs" exclusively to ASCAP. If ASCAP is dissolved in Nebraska because it is an unlawful monopoly acting within the State, the public performance rights for all the music obtained from the Irving Berlin Company, for example, will revert in that owner. The same will be true with Schirmer, Harms, Warner Bros., and all of the other music publishing houses that have combined together to make up the ASCAP monopoly. Nowhere does the Nebraska Act define a music publishing house, no matter how

large, as an unlawful monopoly acting in restraint of trade. It is only a combination of substantial numbers of music houses as owners that combine together to fix prices in restraint of trade in public performance rights that Section 1 of the Nebraska Act declares to be unlawful when so acting in that manner within Nebraska.

29. However, Section 2 (A) does state that such a classification, whether it be a publisher that owns thousands of pieces, or an individual composer that owns one or more pieces, when they sell their music for public performance rights for profit must fix the selling price thereon. Section 2 (B) provides, as a penalty measure, that if the owner refuses to do so in defiance of the requirement, then a person who buys that music shall have the right to publicly perform it for profit without paying anything further for the public performance rights that have not been reserved or restricted or withheld.

30. The lower court held that Section 2 (B) was the inducing cause for the passage of the Act and was inseparable from all the balance of the Act. Appellants understand that Section 2 (A), 2 (B) and 2 (D) (the latter in reference to the filing of the copyrights with the Secretary of State by the individual or the publisher) may, any one or all three, be stricken from the Act, and no enforcement officer of the State of Nebraska and no defendant in a case would be affected in the enforcement of all the remaining portions. If an action were started to dissolve the unlawful combination, any one, or all three, sections dealing with the individual, would not be brought into play. Or, on the other hand, if an individual composer sought to enforce his rights for public performance, even though he had not collected the selling price for public performance when the music was sold for that purpose, such legal controversy would stand absolutely independent of the balance of the Act, namely, the Section 1 provision against the unlawful price fixing combination, and the enforcement provisions in reference thereto.

31. As appellants understand, the National Copyright Law and the court decisions except decrees *established by consent* neither announce that a composer or his publisher has the right to collect the "small" public performance rights *each and every time music is played by the user who purchased it obviously for public performance rights and with no specific restrictions against* its repeated use for that purpose. Orchestrations or other arrangements or rearrangements are necessary for bands and orchestras when playing these compositions; these are bought from the publisher for the composer's profit and both well know that such music is so purchased for use for public performance for profit.

32. The case of Herbert vs. Shanley, in which the opinion was written for this Court by the late Justice Holmes, is cited by ASCAP and published in its advertisements, sometimes with the picture of Judge Holmes, as the legal authority for the right of ASCAP to collect for public performance rights each and every time the music is played publicly for profit, even though bought and paid for obviously for public performance rights by that particular purchaser.

33. The Herbert vs. Shanley case decides one point and only one, and that is that it is not necessary that an admission be charged at the door of an establishment where the music is played, in order to constitute public performance for profit. The court evidently *refused* to hold that the composer was *entitled to collect each and every time the music in that case was played for public performance for profit*. Under the Copyright Law and the decisions in reference to dramatico-musical compositions that are played on the stage, or elsewhere, the composer is protected against *repeated* performances by the users, and therefore always a cash deal is made when the dramatico-musical composition is licensed for a term of years, or a percentage of the box office receipts is provided. There is no authority in the National Copyright Act nor in the decisions in connection with non-dramatic musical compositions granting the right to collect for public performance each time—unless by special con-

tract or arrangement, or notice of withholding the right entirely. After the user had bought the music and paid for it for public performance rights, the law construes that it was released and alienated to the purchaser for public performance rights and for use as frequently as the user might wish.

34. The Jewell La Salle case, cited by the appellees (opinion of this Court given by Justice Brandeis) is no authority for the activities of ASCAP in collecting for each and every time music purchased for public performance is so played. That case held that the presentation of music over a radio, in a hotel, or in the rooms of a hotel, was a public performance, but the Court refused to hold that it was a public performance for profit.

35. There have been some cases that have been decided by *consent decrees* entered by arrangements between the ASCAP attorneys and those on the other side, which hold that ASCAP may collect its public performance rights "whilst and where they may," but that is not binding upon the legislature of the State of Nebraska, nor the citizens of our state who were not parties to such "consents." Congress has legislated upon the subject, only by granting to the copyright owner and his assigns the public performance right, but Congress carefully avoided granting him the right to collect on an ordinary musical composition after it was sold for public performance purposes, each and every time that the individual who bought it played it publicly for his own profit.

36. The composer *may* collect each and every time there is a performance of a dramatico-musical composition, because there is justification for it in the National Copyright Law and the decisions in reference thereto. However, the Nebraska Act does not mention dramatico-musical compositions. Therefore, ASCAP and the other appellees are not concerned with such performing rights. Thus it appears there is justification for the validity of Section 2 (A) of the Act in question because it deals independently with the individual copyright owner's rights.

37. When the legislature of the State of Nebraska sought to avoid and prevent further unlawful practices by some other combination and some other organization that might arise to hamper both the composer and the user, it provided that public performance rights for profit in the ordinary "small" vocal and instrumental musical compositions shall be bargained for and collected at the time such music is sold for that purpose, because when the composer or his assigns parts with the right without a contract for this special use, he releases his performance right for that purpose to the purchaser for such repeated uses as that particular owner might wish unless a contract is made or a restriction is reserved to the contrary, and this may be done under the Nebraska law.

38. Appellants again call the Court's attention to the fact that the state courts have not passed upon any of the questions here involved; and especially they have not passed upon the "separability" and the "inducing" cause features mentioned in the opinion *alone*. Therefore, if this appellate Court decides that the opinion, which based the invalidity of the entire Act upon those features, is before this Court for review, then these matters which we have here outlined orally should be taken into consideration and study given to the problem as has been more fully set forth with authorities in appellants' brief.

39. If the Court decides that Sections 2 (A) and 2 (B) and 2 (D), or any one of those three sections, dealing with the individual, are in derogation of the National Copyright Act, and that the legislature of Nebraska overstepped its police power in enacting those provisions, then appellants contend that the balance of the Act must stand as valid in all its other parts.

40. If, however, the Court should decide the inseparability feature is pertinent and necessary for a decision in this case, then appellants believe they are justified in calling the Court's attention to the fact that the permanent injunction should be modified or set aside entirely, and the appellants, enforcing officials of

the State of Nebraska, given an opportunity to have those particular *state matters* reviewed by the courts of the State of Nebraska in a suit brought for that purpose, either under the provisions of the Act itself, or in some other appropriate manner in the present action.

41. Appellants believe, however, that the State of Nebraska has the right to determine in what manner public performance rights shall be *used and dealt with and bargained for within the State of Nebraska*; that in so doing it does not in any way act in derogation of the National Copyright Act. The reading of the cases in appellants' brief and those of the appellees as well, will convince this Court that ASCAP is dealing with an intangible and incorporeal right, namely, the right of public performance for profit, which right is being abused by the appellee, ASCAP.

42. Unless the copyright owner and his publisher confer and devise some lawful plan of bargaining for their public performance rights on the music they decide to sell for public performance rights within the State of Nebraska, they cannot complain because the legislature pointed the way to an orderly and legal method for them, to be enforced by law if necessary, for the benefit of all parties concerned.

43. Furthermore, the evidence shows that the composer and publisher would make more money from a practical standpoint in handling their public performance rights in the manner provided in Section 2 (A) of the law. A compliance would do away with the necessity for this overriding organization, known as ASCAP, which has taken upon itself the interpretation of the law and everybody's rights in dealing with public performance rights for profit. Most certainly the record in this case is clear that ASCAP has performed and is performing in a manner that was never intended by the National Congress when it passed the Copyright Law.

44. ASCAP by the method under which it does business should be convinced by this Court's decision that nowhere does the National Copyright Act give them the right to charge 5% of the gross receipts of a busi-

ness for a blanket license; or, so much per seat in a theatre where its music is played; or, so much per year for a hotel based upon the size of its dance floor; or for the collection of any sum of money it can exact from the very many small users of music in Nebraska that must depend for their livelihood in part upon the public performance rights of music exclusively controlled by ASCAP as found by the lower court.

45. If, as ASCAP contends, the collection of public performance rights for profit may only be accomplished by carrying on the business in the illegal manner in which it does carry on, then it is obvious that ASCAP violates every principle of American jurisprudence in reference to monopolies and price-fixing practices in restraint of trade, in order to accomplish its objectives and purposes. Such position is not tenable. There is reversible error, apparent in the record, because the findings of fact, and conclusions of law, which must properly support the permanent injunctive decree, are based fundamentally upon necessity and expediency alone.

The appellants upon behalf of all of the citizens of the State of Nebraska request this High Court to reverse the decree because the record clearly shows that the entire subject is surcharged with a definite public interest and that it is within the powers reserved to the people of the State of Nebraska to cause their legislature to pass, and the appellant State officials to enforce, the Nebraska legislative bill in question.

WILLIAM J. HOTZ.

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